Taisho Co Sdn Bhd v Pan Global Equities Bhd & Anor

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO P-02-64 OF 1996
SHAIK DAUD, ABU MANSOR AND HAIDAR JJCA
30 DECEMBER 1998

Civil Procedure *— Amendment — Statement of claim — Application to amend filed four years after action was filed — Factors to be considered — Whether appellant satisfied requirements in O 20 r 5(2) and (5) of the Rules of the High Court 1980 — Rules of the High Court 1980 O 20 r 5*

The appellant filed an application for amendment of its statement of claim under O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). The High Court dismissed the application on the grounds that the amendment was to add a new cause of action to overcome the defence of limitation and that the application to amend was filed four years after this action was filed. In the circumstances, the High Court held that it was not in the interest of justice to allow the application to amend. The appellant appealed against this decision.

Held, dismissing the appeal:

A plaintiff seeking an order under O 20 r 5 of the RHC must satisfy two requirements in O 20 r 5(2) and (5): (i) that the facts of the case remain the same or substantially the same; and (ii) that it would be just to grant leave to amend. If he fails one, he fails altogether. In the present case, the appellant had satisfied condition (i) but had failed to satisfy condition (ii). Further, the question of whether this application was bona fide also had to be considered. No reasons were given for the delay in filing this application and the application bordered on lack of bona fides. The High Court judge had correctly considered the two requirements under O 20 r 5(2) and (5) and had exercised his discretion judicially. There were no good grounds for this court to interfere (see pp 363I and 364A, G–I).

[Bahasa Malaysia summary

Perayu memfailkan permohonan untuk meminda pernyataan tuntutannya di bawah A 20 k 5 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Mahkamah Tinggi telah menolak permohonan atas alasan bahawa pindaan adalah untuk menambah kausa tindakan yang baru untuk mengatasi pembelaan had masa dan bahawa permohonan untuk meminda difailkan empat tahun selepas tindakan ini difailkan. Dalam keadaan begitu, Mahkamah Tinggi memutuskan bahawa ia bukanlah dalam kepentingan keadilan untuk membenarkan permohonan untuk meminda. Perayu merayu terhadap keputusan ini.

Diputuskan, menolak rayuan:

Plaintif yang memohon perintah di bawah A 20 k 5 KMT mestilah memenuhi dua keperluan dalam A 20 k 5(2) dan (5): (i) bahawa fakta-

fakta kes tetap sama atau pada dasarnya sama; dan (ii) bahawa ia adalah adil untuk memberikan kebenaran untuk meminda. Sekiranya ia gagal memenuhi satu, ia gagal sama sekali. Dalam kes ini, perayu telah memenuhi syarat (i) tetapi telah gagal memenuhi syarat (ii). Seterusnya, persoalan mengenai sama ada permohonan ini adalah bona fide juga hendaklah diambil kira. Tiada alasan telah diberikan untuk kelewatan dalam memfailkan permohonan ini dan permohonan ini seakan-akan kekurangan bona fides. Hakim Mahkamah Tinggi telah dengan betulnya mempertimbangkan kedua-dua keperluan di bawah A 20 k 5(2) dan (5) dan telah melaksanakan budi bicara beliau dengan adil. Tiada alasan yang kukuh untuk mahkamah mengganggu keputusan itu (lihat ms 363I dan 364A, G–I).]

Notes

For cases on amendment of statement of claim, see 2(1) *Mallal's Digest* (4th Ed, 1998 Reissue) paras 338–341.

Cases referred to

Hock Hua Bank Bhd v Leong Yew Chin [1987] 1 MLJ 230 (refd)
Lim Yong Swan v Lim Jee Tee & Anor [1993] 1 SLR 500 (refd)
Multi-Pak Singapore Pte Ltd (In receivership) v Intraco Ltd & Ors [1992] 2 SLR 793; [1993] 2 SLR 113 (refd)
Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors [1983] 1 MLJ 213 (refd)

Legislation referred to

Rules of the High Court 1980 O 18 r 19, O 20 r 5(2), (5)
Rules of the Supreme Court 1970 (Singapore) O 20 r 5(2), (5)

Appeal from: Civil Suit No 22–141 of 1991 (High Court, Pulau Pinang)

Jagjit Singh Sidhu (*Lim Kean Siew & Co*) for the appellant.
YK Leong (*Riza Leong & Partners*) for the respondent.

Haidar JCA (delivering the judgment of the court): The appellant (plaintiff) filed an application before the senior assistant registrar for amendment of para 5 of its statement of claim. The application was dismissed. The appellant appealed to the judge in chambers. The learned judge dismissed the appeal. The appellant filed an appeal to this court against the decision of the learned judge.

The application for amendment of para 5 of the statement of claim was made pursuant to O 20 r 5 of the Rules of the High Court 1980 ('the RHC'). The proposed amendment reads:

> The said loans and the interest payable thereon were acknowledged by the first and the second defendants as late as April 1987.

Before considering the issue as to whether the application was properly dismissed, it would be appropriate to set out the background facts that led to the application by the appellant.

Background

The appellant filed this action on 29 May 1991. This action relates to loans of RM1,060,000 to the first respondent and RM500,000 to the second respondent. As at 31 December 1990, the first respondent was indebted to the appellant in the sum of RM3,688,370.90 and the second respondent was indebted in the sum of RM1,822,276.44, both inclusive of interest. It seemed the appellant is an associate company of the respondents by reason of being a minor shareholder.

On 16 September 1992, the appellant filed a summons in chambers to strike out the defence of the respondents pursuant to O 18 r 19 of the RHC. It was allowed. The respondents appealed to this court. The appeal was allowed on 27 October 1994 (Civil Appeal No P–02–168–94) though counsel for the appellant contended that the date was wrongly stated by the learned judge and the correct date should be 4 May 1995.

On 5 May 1995, the appellant filed an application to amend para 5 of its statement of claim. It was dismissed by the senior assistant registrar and on appeal to the judge in chambers, the order of the senior assistant registrar was affirmed. Hence the present appeal before us.

The amendment

According to the learned judge, in spite of the defence of limitation, he still allowed the application of the appellant to strike out the defence and gave judgment to the appellant. However, on appeal, this court set aside the order of the learned judge. In other words, the action should proceed to trial.

It seemed clear, according to the learned judge, that the amendment was to add a new cause of action to overcome the defence of limitation, the ground on which it earlier failed in the appeal before this court (see p 18 of the appeal record).

The learned judge stated that the application to amend was filed four years after this action was filed and the 'acknowledgement', said to have been made at the latest on April 1987, was four years before proceeding to file this action. In the circumstances, the learned judge was of the view that it was not in the interest of justice to allow the application to amend and dismissed it with costs.

The issue hinges on the interpretation of O 20 r 5 of the RHC. This rule is in pari materia with the English rule of court and similar to the Singapore rule of court and reads:

> Amendment of writ or pleading with leave (O 20 r 5)
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> (1) Subject to Order 15 rules 6, 7 and 8 and the following provisions of this rule, the Court may at any stage of the proceedings allow the plaintiff to

amend his writ, or any party to amend his pleading, on such terms as to costs or otherwise as may be just and in such manner (if any) as it may direct.

(2) Where an application to the Court for leave to make the amendments mentioned in paragraph (3), (4) or (5) is made after any relevant period of limitation current at the date of issue of the writ has expired, the Court may nevertheless grant such leave in the circumstances mentioned in that paragraph *if it thinks it just to do so.*

(3) An amendment to correct the name of a party may be allowed under paragraph (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or, as the case may be, intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under paragraph (2) if the capacity in which, if the amendment is made, the party will sue is one in which at the date of issue of the writ or the making of the counterclaim, as the case may be, he might have sued.

(5) An amendment may be allowed under paragraph (2) notwithstanding that the effect of the amendment will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to make the amendment. (Emphasis added.)

The rationale behind O 20 r 5 is explained by the editors of the Supreme Court Practice 1997 at para 20/5–8/7 and reads:

> The principle underlying the powers of the court under r 5 is that if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified in paras (3), (4) and (5) the defence of limitation would not have been available to the defendant; and accordingly, if in its discretion, the court thinks it just to grant leave to amend defects in the writ or pleading within the scope of the circumstances in these paras, so that such defects in the proceedings are treated as having been cured ab initio, the defendant is not being deprived of the benefit of a defence which he would have had if the proceedings had been so properly formulated or constituted in the first place. To contend in the cases specified in the paras, that the defendant has an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the court will not use its powers to amend under O 20 r 8, and O 15 rr 6, 7 and 8 (see per Holroyd Pearce LJ in *Pontin v Wood* [1962] 1 QB 594 at p 609; [1962] 1 All ER 294 at p 298).

The above passage appeared in para 20/5–8/7 of the Supreme Court Practice 1991 and quoted by Yong Pung How CJ in the Singapore Court of Appeal case of *Lim Yong Swan v Lim Jee Tee & Anor* [1993] 1 SLR 500 at p 508.

In the result, Yong Pung How CJ on the same page stated thus:

> A party seeking to amend under O 20 r 5(5) must therefore show:

(1) that the cause of action arises out of the same or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action, and

(2) if the court thinks it is just to grant leave to make the amendment.

As to condition (1), we were in agreement with counsel for the respondents that the correct test was that set out in the case of *Steamship Mutual Underwriting Association Ltd v Trollope & Colls (City) Ltd* (1986) 33 BLR 77, and approved in *The 'Casper Trader'* [1991] 2 Lloyd's Rep 237: whether there is a sufficient overlap between the facts supporting the existing claim and those supporting the new claim.

The learned judge in his judgment answered in the affirmative as to condition (1), as posed by Yong Pung How CJ. The same view of the rule (condition (1)) was taken by the Supreme Court in *Hock Hua Bank Bhd v Leong Yew Chin* [1987] 1 MLJ 230 and quoted with approval by Yong Pung How CJ in *Lim Yong Swan*. We accepted the finding of the learned judge that condition (1) had been satisfied by the appellant.

As to the scope of condition (2), Yong Pung How CJ in *Lim Yong Swan* stated at the same page:

> Clearly, the fact that the party opposing the amendment would be deprived of an accrued right of limitation would not itself make it unjust to give leave to amend. *It is one of the factors that can be taken into account.* The purpose of paras (2) to (5) was to remove that reason as an absolute bar and we have already set out the rationale behind the introduction of the paragraphs stated in the Supreme Court Practice. Accordingly, we did not accept counsel for the appellant's submission that the fact that the action was time-barred meant ipso facto that any amendment would be unjust to the appellant. (Emphasis added.)

The learned CJ of Singapore in agreeing with the view of Webster J in *The 'Casper Trader'* stated:

> When *The 'Casper Trader'* was before the judge in chambers, Webster J expressed the view that consideration of whether it would be unjust to grant leave to amend under para (5) required a balancing of the applying party's need to amend and the prejudice to the opposing party's interest. 'Prejudice' in this context, in the opinion of the learned judge, meant at p 243:
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> > 'For the purpose of answering this question I do not think it relevant simply to consider whether the defendants will or may have difficulty in defending the claim, specifically at the trial. In my view for any relevant prejudice to be found it must constitute prejudice resulting from the amendment, either in the sense that the defendants, in reliance on the claim originally made, altered their position so as to make it more difficult to defend the new claim now made or in the sense that it will be more difficult for them to defend the claim than it would have been had the claim been brought within the period of limitation.'

GP Selvam JC, in *Multi-Pak Singapore Pte Ltd (In receivership) v Intraco Ltd & Ors* [1992] 2 SLR 793, in considering the true construction of O 20 r 5(2) and (5) stated at p 802, 'a plaintiff seeking an order under it must satisfy two requirements: (a) that the facts of the case remain the same or substantially the same; and (b) that the justice of the case is with him. If he

fails in one, he fails altogether. As the power conferred on the court is discretionary, the court considering the application should adopt a broad common sense approach.

The learned JC went on further to state at p 803:

> Even if the plaintiffs had complied with the first requirement, they had not shown that it would be just to grant them the application. A party asking the court to exercise a discretionary power in his favour must place some material and advance some cogent reasons to impel the court to lean on his side: see *Ratnam v Cumarasamy* [1965] 1 WLR 8.

The judgment of the learned JC was affirmed by the Court of Appeal (see *Multi-Pak Singapore Pte Ltd (In receivership) v Intraco Ltd* [1993] 2 SLR 113).

The two requirements stated by the learned JC are similarly covered by our O 20 r 5(2) and (5). The learned CJ of Singapore in *Lim Yong Swan* on the other hand described the two requirements as conditions. It makes no difference as it is a matter of choice of words. We therefore could not possibly see anything wrong in the learned judge relying on the Singapore cases for guidance in the construction of our O 20 r 5(2) and (5).

In *Yamaha Motor Co Ltd v Yamaha Malaysia Sdn Bhd & Ors* [1983] 1 MLJ 213, the Federal Court went on further to state that three basic questions should be considered to determine whether injustice would or would not result in considering the application for amendments. One of the basic questions is whether the application was bona fide.

The learned judge intimated that the application was made after the appellant failed on appeal to this court to affirm the judgment entered by it initially. Further, he said that the appellant had knowledge of the 'acknowledgement' as late as April 1987, that is four years before the action was filed. Furthermore, the application was filed four years after the commencement of this action. We would add further that no reasons were given for the delay in filing the application when the point of admission was obviously available even before filing the proceedings. As rightly opined by the learned JC in *Multi-Pak Singapore Pte Ltd* and correctly followed by the learned judge, the appellant did not place some material and advance some cogent reasons to impel the court to lean on its side. We would further add that the application borders on lack of bona fides, one of the basic questions set out in *Yamaha Motor Co Ltd.*

The learned judge was of the view that condition (2) had not been satisfied by the appellant, that is it would be just to grant leave to amend.

We were of the opinion that the learned judge had correctly considered the two requirements or conditions envisaged under O 20 r 5(2) and (5) of the RHC. In the circumstances, he had exercised his discretion judicially. As the appellant failed in one, it failed altogether. There were no good grounds for us to interfere.

A The appeal was dismissed with costs. The deposit ordered to be paid to the respondents to account of taxed cost.

Appeal dismissed.

Reported by Jafisah Jaafar

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